SUPREME COURT OF THE UNITED STATES.

No. ~~250.~~ 166

ELISHA VANCE, PLAINTIFF IN ERROR,

vs.

JOHN CAMPBELL, WILLIAM ELLISON AND DAVID T. WOODROW.

IN ERROR TO THE CIRCUIT COURT U. S. FOR THE SOUTHERN DISTRICT OF OHIO.

GEO. S. GIDEON, printer, 511 Ninth street, Washington, D. C.

SUPREME COURT OF THE UNITED STATES.

No. 250.

ELISHA VANCE, PLAINTIFF IN ERROR,

vs.

JOHN CAMPBELL, WILLIAM ELLISON AND DAVID T. WOODROW.

IN ERROR TO THE CIRCUIT COURT U. S. FOR THE SOUTHERN DISTRICT OF OHIO.

INDEX.

	Original.	Print
Summons and marshal's return	2	1
Declaration	4	2
Plea	9	5
Replication	10	6
Additional security for costs	11	6
Judgment	15	9
Bill of exceptions	16	10
Exhibit "A"	24	13
Drawing referred to	28	16
Bond to prosecute writ of error	29	16
Writ of error	31	17
Citation and service	32	18
Clerk's certificate	34	19
Assignment of errors	36	19

Gideon, print.

At a special and adjourned term of the circuit court of the United States for the seventh circuit and southern district of Ohio, begun and held at the court-house in the city of Cincinnati, on the third Tuesday, being the twentieth day of December, in the year of our Lord one thousand eight hundred and fifty-nine, and of the independence of the United States the eighty-fourth.

Present, the Honorable Humphrey H. Leavitt, one of the judges of said court. Among others, the following proceedings were had, to wit:

HLISHA VANCE
vs.
JOHN CAMPBELL, WILLIAM ELLISON, and DAVID T. WOODROW. } 1,163.

Be it remembered, that heretofore, to wit, on the seventeenth day of January, in the year of our Lord one thousand eight hundred and fifty-nine, in the term of December aforesaid, came the plaintiff aforesaid, by his attorney, and sued out of the clerk's office of said court his certain writ of summons against the aforesaid defendants, which is clothed in the words and figures as follows, to wit:

Sum'ns.

THE UNITED STATES OF AMERICA,
Southern District of Ohio, ss.

The President of the United States of America to the Marshal of the Southern district of Ohio, greeting:

You are hereby commanded to summon John Campbell, William Ellison, and David T. Woodrow, citizens of and residents in the State of Ohio, if they be found in your district, to be and appear in the circuit court of the United States for the southern district of Ohio aforesaid, at Cincinnati, on the first Tuesday, in the month of February, 1859, to answer Elisha Vance, citizen of and resident in the State of Ohio, of a plea of trespass on the case, damages 10,000, and have you then and there this writ.

Witness the Honorable Roger B. Taney, Chief Justice of the United States, this 17th day of January, A. D. 1859, and in the 83d year of the independence of the United States of America.

Attest: JNO. McLEAN, JR., [SEAL.]
Clerk.

Endorse't.

On the back of said writ is the following endorsement, to wit:

"Suit brought to recover damages for infringing a patent [REC. CCL, D. T., 1860.]—1

granted to plaintiff, February 6th, 1849, for an improvement in cooking-stoves. Damages $10,000."

Return.

And on the first Tuesday of February, in the year of our Lord one thousand eight hundred and fifty-nine, being the day on which said writ was made returnable, came the marshal aforesaid, and made return of said writ with his proceedings endorsed thereon, as also acknowledgment of security for costs, and which is clothed in the words and figures as follows, to wit:

"Received this writ January 17th, 1859, and on the same day I served David T. Woodrow, by delivering to him personally a true and certified copy of this writ.

LEWIS W. SIFFORD, *U. S. Marshal.*
By W. L. MANSON, *Deputy.*

"Received this writ January 19, 1859, and on the same day I served John Campbell, by delivering to him personally a true and certified copy of this writ, at Ironton, 146 miles from Cincinnati.

LEWIS W. SIFFORD, *U. S. Marshal.*
By J. S. BOARDUMOUR, *Deputy.*

"Received this writ Jan. 23d, 1859, and on the 24th day I served William Ellison, by delivering at his residence, in Manchester, a true and certified copy of this writ.

LEWIS W. SAFFORD, *U. S. Marshal.*
By JACOB S. ROSE, *Deputy.*

"C. W. Pomeroy acknowledges himself security for all costs for which the plaintiff may be liable in this suit.

C. W. POMEROY.

"I, Daniel F. Goodhue, acknowledge myself security for all costs for which the plaintiff may be liable in this suit.

D. F. GOODHUE.

May 4th, 1859."

And now here, to wit, on the first day of February, in the term and year last aforesaid, came the plaintiff by his attorney, and filed his certain declaration, clothed in the words and figures as follow, to wit:

Dec'n.

Circuit Court of the United States for the Seventh circuit and Southern district of Ohio—December Term, A. D. 1858.

ELISHA VANCE
vs.
JOHN CAMPBELL, WILLIAM ELLISON, and DAVID T. WOODROW. } Trespass on the Case.

833

The plaintiff, Elisha Vance, comes and complains of the defendants, John Campbell, William Ellison, and David T. Woodrow, in a plea of trespass on the case, for that whereas the said Elisha Vance, before and at the time of the making of the letters-patent, and of the committing the grievances by the said defendants, hereinafter next mentioned, was the original and first inventor of a certain new and useful improvement in cooking-stoves, to wit, at the town of Wilmington, in the State of Ohio, in the district aforesaid: and thereupon, heretofore, to wit, on the sixth day of February, A. D. 1849, at the city of Washington, to wit, in the district aforesaid, certain letters-patent under the hand of the Secretary of State of the United States, with the seal of the Patent Office of the United States thereto affixed, countersigned by the Commissioner of Patents of the United States, bearing date the day and year last aforesaid, were granted to the said Elisha Vance, (which letters-patent, or a duly authenticated copy thereof, the plaintiff now brings into court,) whereby was granted and secured to the said Elisha Vance, his heirs, administrators, or assigns, for the term of fourteen years from said 6th day of February, A. D. 1849, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said invention and improvement, a full and exact description of which, with the mode of constructing and applying the same, is set forth in the written specification or description of the said Elisha Vance, in the words of the said Vance, filed in the Patent Office of the United States, before the granting of said letters-patent, and made part of the same, as by reference to the aforesaid specification or description (here brought into court as aforesaid) will more fully and at large appear.

The plaintiff further says, that said invention and improvement so patented was new and useful; that the said Elisha Vance was, at the time of his application for said patent, a citizen of the United States; that he was the original and first inventor of said invention and improvement so patented; and that the same was not known or used before his said invention, and was not in public use or on sale, with his consent or allowance, for more than two years before his application for said letters-patent.

The plaintiff further says, that he has heretofore made, constructed, used, and vended to others to be used, said invention and improvement, to his great advantage and profit, to wit, at the district aforesaid. Yet the said defendants well knowing the premises, but contriving and wrongfully intending to injure the said plaintiff, and to deprive him of the profits, benefit, and advantage, which he might and otherwise would have derived and acquired from the making, constructing, using, vending to others to be used, the said invention and improvement, after the making of said letters-patent, and within the said term of years in the said letters-patent mentioned, to

wit, on the first day of July, A. D. 1849, at the county of Hamilton, and at the county of Lawrence, to wit, in the district aforesaid, and on divers other days and times between that day and the commencement of this suit, unlawfully and unjustly, against the will of said plaintiff, and without the leave or license of the said plaintiff, did vend to others to be used a great number, to wit, fifty thousand cooking-stoves made in imitation of said invention in breach of said letters-patent, and in violation and infringement of the exclusive right thereto so as aforesaid acquired by the plaintiff, and contrary to the form of the statutes in such case made and provided, whereby the said plaintiff, patentee as aforesaid, has been greatly injured and deprived of a great part of the profits and advantages which he might, and otherwise would have derived and acquired from the said invention, to wit, at the district aforesaid. And also for that whereas the said Elisha Vance, before and at the time of the making of the letters-patent, and of the committing of the grievances by the said defendants hereinafter next mentioned, was the original and first inventor of a certain new and useful improvement in cooking-stoves, to wit, at the town of Wilmington, in the State of Ohio, in the district aforesaid; and thereupon, heretofore, to wit, on the sixth day of February, A. D. 1849, at the city of Washington, to wit, in the district aforesaid, certain letters-patent under the hand of the Secretary of State of the United States, with the seal of the Patent Office of the United States thereto affixed, countersigned by the Commissioner of Patents of the United States, bearing date the day and year last aforesaid, were granted to the said Elisha Vance, (which letters-patent, or a duly authenticated copy thereof, the plaintiff now brings into court,) whereby was granted and secured to the said Elisha Vance, his heirs, administrators, or assigns, for the term of fourteen years from said 6th day of February, A. D. 1849, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said invention and improvement, a full and exact description of which, with the mode of constructing and applying the same, is set forth in the written specification or description of the said Elisha Vance, in the words of the said Vance, filed in the Patent Office of the United States before the granting of said letters-patent, and made part of the same, as by reference to the aforesaid specification or description (here brought into court as aforesaid) will more fully and at large appear.

The plaintiff further says, that said invention and improvement so patented was new and useful; that the said Elisha Vance was at the time of his application for said patent a citizen of the United States; that he was the original and first inventor of said invention and improvement so patented; and that the same was not known or used before his said invention, and was not in public

use or on sale with his consent or allowance for more than two years before his application for said letters-patent.

The plaintiff further says, that he has heretofore made, constructed, used, and vended to others to be used, said invention and improvement, to his great advantage and profit, to wit, at the district aforesaid. Yet the said defendants, well knowing the premises, but further contriving and wrongfully intending to injure the said plaintiff, and to deprive him of the profits, benefit, and advantage, which he might and otherwise would have derived and acquired from the making, constructing, using, vending to others to be used, the said invention and improvement after the making of said letters-patent, and within the said term of years in the said letters-patent mentioned, afterwards, to wit, on the first day of July, A. D. 1849, at the county of Lawrence, to wit, in the district aforesaid, and on divers other days and times between that day and the commencement of this suit, unlawfully and unjustly, against the will of said plaintiff, and without the leave or license of the said plaintiff, did make a great number, to wit, fifty thousand cooking-stoves in imitation of said invention, in breach of said letters-patent, and in violation and infringement of the exclusive right thereto, so as aforesaid acquired by the plaintiff, and contrary to the form of the statutes in such case made and provided, whereby the said plaintiff, patentee as aforesaid, has been greatly injured and deprived of a great part of the profits and advantages which he might and otherwise would have derived and acquired from the said invention, to wit, at the district aforesaid, to the damage of the plaintiff ten thousand dollars; and therefore he sues by his attorneys.

LEE & FISHER.

Plea.

And now, here, to wit, on the fifteenth day of February, in the year last aforesaid, came the defendants, by their attorney, and filed their certain plea, which is clothed in the words and figures as follows, to wit:

U. S. Circuit Court S. district of Ohio.

JOHN CAMPBELL, WILLIAM ELLISON, and DAVID T. WOODROW, Defendants, ads. ELISHA VANCE, Plaintiff. } 1163.

Plea.

And the above named defendants now come and defend, &c., and say that they are not guilty of the said supposed grievances laid to their charge in the manner and form as the said plaintiff hath complained against them; and of this they put themselves upon the country for trial, and the plaintiff doth the like.

By Lincoln, Smith & Warnock, their attorneys.

And the said defendants, for a further plea to the declaration aforesaid, say that the said plaintiff ought not to have his aforesaid action thereof against them, because they say that the cause of action in the said declaration mentioned did not at any time within six years next before the commencement of the said action accrue to the said plaintiff, and this they are ready to verify. Wherefore they pray judgment of the said plaintiff his action aforesaid thereof against him ought to have or maintain.

By att'ys, Lincoln, Smith & Warnock.

And now, here, to wit, on the 10th day of March, in the year last aforesaid, "On motion to the court, the default for replication herein is set aside, and leave given to the said plaintiff to reply forthwith, and replication filed. And thereupon, on the day and in the year last aforesaid, came the said plaintiff, by attorney, and filed his replication to said plea, clothed in the words and figures as follows, to wit:

O. B. K., p. 277.

Replica'n.

Cir. Court U. S., South'n district of Ohio.

ELISHA VANCE
vs.
JOHN CAMPBELL and al. } 1163.

The said Elisha Vance, plaintiff, comes and says that the said several causes of action in the said declaration mentioned, and each of them, did accrue to plaintiff within six years next before the commencement of this suit, in manner and form as the plaintiff hath above thereof complained against defendant; and this the plaintiff prays may be inquired of by the country. Wherefore he prays that he ought not to be barred of his action aforesaid.

LEE & FISHER,
Pl'ff's Att'ys.

Cont'd.

And cause was, to wit, from term to term to the term of April, in the year last aforesaid, continued. And now, here, to wit, on the fourth day of May, in the term and year last aforesaid, "On motion of the said defendants, by their attorneys, it is ordered that the said plaintiff give additional security for costs in this case forthwith. And thereupon, D. F. Goodhue, who is by the court deemed good and sufficient, acknowledged himself security for all costs for which the plaintiff may be liable in this suit, by his endorsement upon the original summons herein, and which said endorsement is in the words and figures as follows, to wit:

O. B. K. 318.

Endors't.

I, Daniel F. Goodhue, acknowledge myself security for all costs for which the plaintiff may be liable in this suit.

May 4th, 1859.

D. F. GOODHUE.

And now, here, to wit, on the sixth day of May, in the term and
O. B. K. 322. year last aforesaid, "The plaintiff moves the court to strike out the second issue joined by the parties herein upon the statute of limitations, and for cause shows that said issue is immaterial and unimportant, because the said statute of limitations so pleaded is inapplicable to the present action, and does not affect plaintiff's rights herein. And on the day and term in the
O. B. K. 323. year last aforesaid "Came the parties, by their attorneys, and thereupon came a jury, to wit, Jno. Chaney, L. H. Olds, Amos Layman, N. F. Stone, John Hough, D. C. Wallace, Aug. Stone, Thos. Barry, Wm. B. Van Hook, Henry Kauffmann, P. Dokes, and J. M. Ferguson, who being empanelled and sworn well and truly to try the issue joined between the parties, and the evidence not being completed, the court adjourned the jury until half-past nine o'clock to-morrow morning, to which time this case is continued.

And on the ninth day of May, in the term and year last afore-
O. B. K. 324. said, "Came again the parties, by their attorneys, and the jurors heretofore sworn in this case. Whereupon, on the suggestion of the illness of the counsel for the defendants, it is ordered that the further trial of this case be continued until Monday morning next, at 10 o'clock.

And thereupon, on the ninth day of May, in the term and year
O. B. K. 324. last aforesaid, "Came again the parties, by their attorneys; and thereupon Thos. Barry, one of the jurors heretofore sworn in this case, not appearing, it is, by consent of parties, ordered that the trial of this case proceed with the remaining eleven jurors; and the evidence not being completed, the court adjourned the jury until 9½ o'clock to-morrow morning, to which time this case is continued.

And on the tenth day of May, in the term and year last afore-
O. B. K. 325. said, "Came again the parties, by their attorneys, and the jurors heretofore sworn in this cause; and the evidence in the same not being completed, the court adjourned the jury until half-past nine o'clock to-morrow morning, to which time this cause is continued.

And on the eleventh day of May, in the term and year last
O. B. K. 325. aforesaid, "Came again the parties, by their attorneys, and the jurors heretofore sworn in this cause, and the arguments of counsel not being completed, the court adjourned the jury until to-morrow morning, at half-past nine o'clock, to which time this cause is continued.

And on the twelfth day of May, in the term and year last afore-
O. B. K. 326. said, "Came again the parties, by their attorneys, and the jurors heretofore sworn in this case, and the evidences and arguments of counsel in the same being completed, the court adjourned the jury until half-past nine o'clock to-morrow morning, to which time this case is continued.

And on the thirteenth day of May, in the term and year last
O. B. K. 326. aforesaid, "This day came again the parties, by their attorneys, and the jury heretofore sworn in this case, who, not being able to agree upon a verdict, were discharged by the court, and cause was, to wit, to the term of June, in the year last aforesaid, continued.

And now here, to wit, on the twenty-second day of June, in the
O. B. K. 341. term and year last aforesaid, "On motion of the defendants, this case is continued at the costs of the defendants, and leave is given to file motion to tax the costs, or any portion of the same, to the plaintiff, which motion is now filed.

And now here, to wit, on the first day of September, in the year
O. B. K. 361. last aforesaid, "On motion of plaintiff, the motion of defendant heretofore made in this case, to set aside the former order of this court, taxing the costs of continuance against defendants, is overruled, and cause was, to wit, to the term of October, in the year last aforesaid, continued.

Cont'd.

And now here, to wit, on the thirty-first day of October, in the
O. B. K. 389. year last aforesaid, "On motion of the plaintiff, by his attorney, it is ordered by the court that this case stand continued, at the costs of the defendants, for this term, and cause was, to wit, to the term of December, in the year last aforesaid, continued.

Cont'd.

And now here, to wit, on the third day of January, in the year
K. 441. of our Lord one thousand eight hundred and sixty, and in the special term last aforesaid, "Came the parties, by their attorneys, and thereupon came a jury, to wit: Samuel Pickens, William H. Lawder, James Sharp, George B. Frye, George W. Johnson, James H. Burton, Thomas J. Wite, John Christ, Sylvester Fries, D. C. Smith, John Bonner, and George Kelch, who were empanelled and sworn, well and truly to try the issue joined between the parties; and the evidence in this case not being completed, the court adjourned the jury until to-morrow morning, at 9½ o'clock, to which time this cause is continued.

And on the fourth day of January, in the term and year last
O. B. K. 443. aforesaid, "Again came the parties, by their attorneys, and the jurors heretofore empanelled and sworn in

this case, and the evidence not being completed, the court adjourned the jury until to-morrow morning, at half-past nine o'clock, to which time this case is continued.

O. B. K. 444. And on the fifth day of January, in the term and year last aforesaid, "Came again the parties, by their attorneys, and the jurors heretofore sworn in this case, and the evidence not being concluded, the court adjourned the jury until to-morrow morning, at half-past nine o'clock, to which time this cause is continued.

O. B. K. 446. And on the sixth day of January, in the term and year last aforesaid, "Again came the parties, by their attorneys, and the jurors heretofore empanelled and sworn in case, and the arguments of counsel not being completed, the court adjourned the jury until to-morrow morning, at 9½ o'clock, to which time this case is continued.

O. B. K. 446. And on the seventh day of January, in the term and year last aforesaid, "Came again the parties, by their attorneys, and the jurors heretofore sworn in this case, and the arguments of counsel not being finished, the court adjourned the jury until Monday morning, at 10 o'clock; continued till then.

O. B. K. 448. And on the ninth day of January, in the term and year last aforesaid, "Came again the parties, by their attorneys, and also the jurors heretofore empanelled and sworn in this case, and the arguments of counsel not being completed, the court adjourned the jury until to-morrow morning, at half-past nine o'clock, to which time this case is continued.

O. B. K. 449. And on the tenth day of January, in the term and year last aforesaid, "Came again the parties, by their attorneys, and also the jury, to wit: Samuel Pickens, William H. Lawder, James Sharp, George B. Frye; George W. Johnson, James H. Burton, Thos. J. Wite, John Christ, Sylvester Fries, D. C. Smith, John Bonner, and George Kelch, heretofore empanelled and sworn, the truth to speak upon the issue joined between the parties, upon their oaths do say, that the said defendants are not guilty in manner and form as the said plaintiff hath complained against them. Therefore, it is considered that the said defendants go hence, without day, and recover of the said plaintiff his costs herein expended, taxed at $; and now comes the plaintiff, by his attorneys, and moves the court to set aside the verdict rendered herein and for a new trial, for reasons on file.

O. B. K. 470. And now here, to wit, on the third day of February, in the year last aforesaid, "On motion, the bill of exceptions heretofore taken to the rulings and charge of the court in the above cause by the plaintiff, and this day presented and signed, is ordered to be made part of the record of this cause, and which bill of exceptions is in the words and figures as follows, to wit:

Bill of Exceptions.

United States Circuit Court, Southern district of Ohio.

ELISHA VANCE
vs.
JOHN CAMPBELL, DAVID T. WOODROW and al. } No. 1,163.—Bill of Exceptions.

Be it remembered, that on the trial of this cause, the plaintiff, to sustain the issue on his part, offered in evidence his patent herein declared on, dated February sixth, A. D. 1849, for an "improvement in cooking-stoves," hereto appended marked A, and made part of this bill of exceptions, and thereupon offered evidence to sustain the utility of his patented improvement, and called to the stand as a witness Daniel F. Goodhue, who testified that he had sold stoves, and was familiar with their principles and mode of operation, and that he believed the stove made and sold by defendants, which was then in court, and shown to the witness, was identical in its principle and mode of operation with that patented to the plaintiff when the said stove of defendant was used with its damper up for baking; that defendants' stove had a rolling damper; that when said damper was down the stove was different in principle from plaintiff's; but when said damper was up, it closed the front of the diving flue, and said stove was then the same in its mode of operation with the stove patented to plaintiff. Thereupon the defendants upon cross-examination asked the witness the following question: "How long have you known the rolling damper to be used in connection with the old premium stove?" To which question the plaintiff objected, because it tended to attack the novelty of the improvement patented to plaintiff, and no notice to that effect had been given by the defendants; but the court held that the question had no application to the originality of the plaintiff's invention as a combination, but might have a bearing on the question of utility, and overruled said objection, and permitted the witness to answer the question; to which ruling the plaintiff excepted, and this, his bill of exceptions, is signed and sealed accordingly. The plaintiff then introduced proof that the specifications of his patent sufficiently described his invention to enable a mechanic to construct said patented improvements, and proved that the defendants had made and sold about eight thousand of the stoves, of which a specimen was produced in court, and shown to the witness, Daniel F. Goodhue, and which said plaintiff claimed to be an infringement upon his patented improvement; and said plaintiff further proved by several witnesses, that the front plate "A," described in said patent, was not material to the successful working of said stove as patented to plaintiff; that said front plate was not used in defendants' stove, and plaintiff offered proof that its absence in defendants' stove did not constitute a difference in principle and mode of operation between the stove patented to

plaintiff and that made and sold by the defendants; to the admission of which evidence the defendants objected, but the court overruled their objection, reserving the question of its competency until the charge to the jury. A stove and models of stoves containing the improvement patented to plaintiff, and a stove and models of stoves as made and sold by defendants, were also produced in court and put in evidence, and the plaintiff having introduced proof, both of the profit derived from the sale of his stove, and of his license price, rested his case.

Thereupon the defendants, to sustain the issue on their part, introduced as a witness Stephen H. Burton, and asked him the following question: "How long have you known diving pipes to be used in the back of stoves?" To which question the plaintiff objected, because it tended to attack the novelty of the improvement patented to plaintiff, and no notice to that effect had been given by the defendants; but the court held that the question had no application to the novelty of the plaintiff's invention as a combination, but might have a bearing on the question of its utility, and overruled said objection, and permitted the witness to answer the question, who thereupon replied: "I have known stoves with diving flues for twenty-three years." To which ruling of the court the plaintiff excepted, and this, his bill of exceptions, is signed and sealed accordingly. The defendants thereupon introduced as a witness William Resor, and asked him the following question: "How long have you known diving flues to be used in stoves to distribute heat at the back of the oven? and afterwards asked the witness the following question: "How long have you known stoves to be used with an upright plate in front?" To both of which questions the plaintiff objected, because it tended to attack the novelty of the plaintiff's improvement as patented, and no notice had been given to that effect by the defendant; but the court held as above, that the evidence proposed did not impeach the novelty of the plaintiff's invention as a combination, but might be relevant to the question of its utility, and overruled said objection, and permitted the witness to answer said questions, who thereupon answered separately to the questions that he had "known a diving flue, and also an upright plate in a stove, for nineteen or twenty years;" to which rulings of the court the plaintiffs excepted, and this, his bill of exceptions, is signed and sealed accordingly.

Thereupon, in rebuttal, the plaintiff's counsel offered the plaintiff, Elisha Vance, as a witness in his own behalf, and asked that he be sworn and permitted to testify in his own behalf, claiming that he was a competent witness, under and by virtue of the statutes and laws of the State of Ohio and the act of Congress, without stating what he expected to prove by said Vance. The defendants objected to the competency of said plaintiff as such witness, because he was a party to the record and thereby disqualified;

which objection the court sustained, and refused to permit the plaintiff to testify on his own behalf, as being in direct conflict with the law and a rule of this court; to which ruling the plaintiff excepted; and this his bill of exceptions is signed and sealed accordingly.

And thereupon, the evidence being concluded, the plaintiff asked the court to charge the jury that—

1st. If the plaintiff and patentee had claimed in his patent anything as material that is not really material to his invention, he is not thereby precluded from recovering damages for the use of the other and material portions of his improvement unless he claimed the immaterial part as material, for the purpose of deceiving the public, and that if the plaintiff had claimed in good faith the front plate "A" as material in his patent, and the jury were satisfied it was not in fact a material or essential element to produce the effect contemplated by the said patentee, and the defendants have used in their stoves all *all* the material parts of the plaintiff's combination, and produced, as well and perfectly by the use of all the essential parts of the combination of plaintiff, the same result, they are liable as infringers.

2d. That the patentee had not claimed in his patent the front plate "A" as material and necessary to produce the contemplated result, but had only claimed the diving-pipe "i," in connection with the flues "F."

But the court refused so to charge the jury, but did charge the jury, in connection with other points, substantially as follows:

"If the front plate "A" is claimed as a material part of the combination, and is necessary to the complete and successful working of the stove, and defendants have not used this plate, or anything that can be regarded as a mechanical equivalent therefor, then the fact of infringement is not made out. There can be no doubt that this front plate is claimed by the patentee as an essential element of his invention. It is true that in his summary he does not specially claim or refer to the front plate as part of his combination, but there is a clear reference to his description as contained in the body of the specification; and looking to that, the claim of the front plate is distinctly set forth as an important element of the combination. The question is, whether, if the defendants have not used the front plate, they have infringed. It is a well-established principle of law, that if defendants do not use all the material parts of a combination, they do not infringe. On the former trial the court referred it to the jury to decide whether the front plate was material to produce the effect of causing an equal distribution of heat; but the defendants now ask the court to say that if they have not used the front plate they have not infringed. The question involved in this inquiry is, whether the plaintiff is at liberty to abandon his claim for the front plate, and

to claim it is not essential or material. The law requires the specification to describe the invention in full, clear, and exact terms; and it is in accordance with the spirit and policy of the whole patent system that a strict compliance with this provision should be exacted of the patentee. I therefore charge you, that when a claim is made to a part of a combination as material to its successful operation, the patentee is bound by his claim. Any other principle, in my judgment, would lead to uncertainty and to many vexatious suits for infringements. This ought, however, to be stated with the following limitation: that when the patentee fails to describe clearly the character and the operation of a particular element of his combination, it may be referred to the jury as a question of fact, to determine what such claim is, and the jury may properly inquire whether the defendants have anything which is a mechanical equivalent for any of the separate parts of the combination. The plaintiff claims that the difference in the length of the flues is a mechanical equivalent for the upright plate in front. If you are satisfied of this, you can find an infringement. Upon this point of identity, the question is not whether the two things are alike in form or dimensions, but whether they act upon the same principle, for it is possible that two mechanical structures may be unlike in appearance and yet alike in principle. But the question of the identity of the two structures belongs exclusively to the jury, to be decided on the evidence. They will determine, subject to the legal principles stated, whether the defendants' stove is substantially the same as that covered by the plaintiff's patent. If the jury find the differences are merely colorable and deceptive, and not real and substantial, in the principle of the two stoves, the defendants will not be protected from liability as infringers.

To which portion of the charge of the court above set forth, and to the refusal of the court to charge as requested, the plaintiff excepted, and asked the court to sign and seal this his bill of exceptions; which is done accordingly, and ordered to be recorded.

H. H. LEAVITT. [SEAL.]

Exhibit "A," referred to in Bill of Exceptions.

No. 6,086.

The United States of America.

To all to whom these letters patent shall come:

Whereas Elisha Vance, of Wilmington, Ohio, has alleged that he has invented a new and useful improvement in cooking-stoves, which he states has not been known or used before his application; has made oath that he is a citizen of the United States; that he does verily believe that he is the original and first inventor or discoverer of the said improvement; and that the same hath not, to the best of his knowledge and belief, been previously known or

used; has paid into the treasury of the United States the sum of thirty dollars, and presented a petition to the Commissioner of Patents, signifying a desire of obtaining an exclusive property in the said improvement, and praying that a patent may be granted for that purpose:

These are therefore to grant, according to law, to the said Elisha Vance, his heirs, administrators, or assigns, for the term of fourteen years from the sixth day of February, one thousand eight hundred and forty-nine, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said improvements, a description whereof is given in the words of the said Elisha Vance, in the schedule hereunto annexed, and is made a part of these presents.

In testimony whereof, I have caused these letters to be made patent, and the seal of the Patent Office has been hereunto affixed.

Given under my hand, at the city of Washington, this sixth day of February, in the year of our Lord one thousand eight hundred and forty-nine, and of the independence of the United States of America the seventy-third.

JAMES BUCHANAN,
Secretary of State.

{Seal of Patent Office.} Countersigned and sealed with the seal of the Patent Office.

EDMUND BURKE,
Commissioner of Patents.

[*Here follows Sketch of Patent.*]

The Schedule referred to in these Letters-patent, and making part of the same.

To all to whom these presents shall come, be it known, that I, Elisha Vance, of Wilmington, in the county of Clinton, and State of Ohio, have invented certain new and useful improvements in cooking-stoves, of which the following is a full, clear, and exact description; reference being had to the annexed drawings of the same, making part of this specification, in which figure 1 is a perspective view of a premium cooking-stove having my improvements applied thereto, the bottom, one end, and part of the front being shown; figure 2 is a vertical section taken through the line X X of figure 1; and figure 3 is an elevation of the back end of the stove, the back plate being removed to expose the diving-pipe and show the arrangement of the flues.

The same letters indicate the same parts in all the figures.

In the accompanying drawings of a "premium cooking-stove" A is the fire-box; B the oven; C the ash-box; which, together with the external plates of the stove, may be formed and arranged in the usual or in any convenient and approved manner.

In all stoves heretofore constructed upon this plan, it has been found very difficult to make the bottom and back plates of the oven sufficiently hot, and equally difficult to prevent the front and top from becoming too much heated; but while the premium stove is admitted to be liable to this very serious objection, it is at the same time acknowledged to be, in other respects, the very best stove in use.

For this difficulty, in baking in these stoves, I have devised an effectual remedy, which consists in a particular arrangement of the flues for the purpose of equalizing the draught above and below the oven, and in placing a cold-air chamber D between the oven B and the flue E, which prevents the front of the oven from becoming unduly heated. To insure a free circulation of cold air in the chamber D, I insert a pipe *d* into its bottom, which admits a continual current of cold air, and make apertures "*d*" in the upper part of its ends, which admit of a constant escape of rarified air. To heat the oven equally on all its sides, it must be uniformly enveloped with the heated products of combustion; to this end the flue is divided at the front of the oven into two branches, one passing above, the other below the oven, and which reunite near the middle of the back flue, where they enter the pipe *i*, which is made to descend to that point; but the placing of the pipe *i* with its lower end in this position, although necessary to divide the heat equally between the top and bottom of the oven, is not alone sufficient, because of the tendency of the current to take the shortest and most direct path to the place of exit; and without the plate A at the front of the cold air-chamber, with a low fire, most of the heat would pass beneath the oven; and with the fire-box full of fuel, most of the heat would pass over the oven, which under these differing circumstances would present opposite extremes of irregularity in the diffusion of heat. To prevent such irregularities, therefore, I place the plate A as seen in figure 2, so that it will form a flue in front of the cold-air chamber, whose mouth is at the same distance from the flue above the oven; that the lower end of the pipe *i* is above the flue below the oven, and these flues being at all times unobstructed, their action is uniform, and the heat is equally distributed under all circumstances on the several sides of the oven. The arrows indicate the course of the upper branch of the current of heat, and the arrow *u* that of the lower branch.

By this arrangement of the flues, and the exit pipe *i*, the heat is not only at all times uniformly distributed over the oven, but it is also directed so as to bring it at the best advantage into contract with such culinary vessels as may be placed on the stove, and containing water or other substances which it is required to boil, so that dampers are in no case required, as the stove is at all times adjusted and in perfect order to perform any culinary operation for which it is adapted, an advantage which all can appreciate who

are acquainted with the difficulty of instructing those persons who are in general more immediately intrusted with the management of cooking-stoves in the proper use and adjustment of dampers.

Having thus described the construction and arrangement of my improved premium stove, what I claim therein as new, and desire to secure by letters-patent, is the combination of the diving-pipe *i*, with the flues F, arranged as herein described, for the purpose of evenly distributing and equalizing the heat on the four sides of the oven, without using or requiring dampers as herein set forth.

In testimony whereof, I have hereunto set my hand in presence of two subscribing witnesses.

ELISHA VANCE.

Witnesses: AMOS L. SEARALL,
ROBERT H. KELLIN,
D. C. HINMANS.

[*For drawing referred to, see original, page* 28.]

O. B. K. 491.

And now here, to wit, on the twenty-first day of March, in the term of February, in the year of our Lord one thousand eight hundred and sixty, this cause came on to be heard on the motion to set aside the verdict heretofore entered herein and for a new trial, and on consideration thereof the court doth overrule the same; therefore it is considered that said defendants go hence without day, and recover of the said plaintiff their costs in this behalf expended, taxed at $, and execution is awarded therefor.

Bond for Writ of Error.

And on the twenty-third day of March, in the year last aforesaid, the aforesaid plaintiff filed a certain bond, clothed in the words and figures as follows, to wit:

Know all men by these presents, that we, D. F. Goodhue and A. B. McNamara, are held and firmly bound unto Campbell, Ellison & Company, in the penal sum of one thousand dollars, to the payment of which, well and truly to be made, we do hereby jointly and severally bind ourselves, our heirs, executors and administrators. Sealed with our seals, and dated this 23d day of March, A. D. 1860.

The condition of the above obligation is such, that whereas the said Elisha Vance has obtained an allowance of a writ of error upon a certain judgment rendered against him in favor of the said Campbell, Ellison & Company, in the circuit court of the United States for the seventh circuit and southern district of Ohio, to the Supreme Court of the United States:

Now, if the said Elisha Vance shall pay the full amount of the

condemnation in said Supreme Court, and costs, in case a judgment shall be entered therein in favor of the appellee, then this obligation shall be void, otherwise in full force and virtue in law.

D. F. GOODHUE, [SEAL.]
A. B. McNAMARA. [SEAL.]

Approved by

H. H. LEAVITT, *Judge, &c.*

Approved by

JNO. McLEAN, Jr., *Clerk.*

Writ of Error.

And on the twenty-sixth day of March, in the year last aforesaid, the following writ of error was filed, clothed in the words and figures as follows, to wit:

Supreme Court of the United States.

UNITED STATES OF AMERICA, *ss.*

The President of the United States of America, to the honorable the Judges of the Circuit Court of the United States for the Seventh circuit and Southern district of Ohio, greeting:

Because in the record and proceedings, and also in the rendition of a judgment in a plea, which is in the said circuit court, before you, between Elisha Vance, plaintiff, and John Campbell, William Ellison and David T. Woodrow, defendants, a manifest error hath happened, to the great damage of the said Elisha Vance, as by his complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf: You are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, on the first Monday in the month of December next, in the said Supreme Court, then and there to be held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Honorable Roger B. Taney, Chief Justice of the said Supreme Court of the United States, this twenty-
[L. S.] sixth day of March, in the year of our Lord one thousand eight hundred and sixty, and of the independence of the United States of America the eighty-fourth.

Attest: JNO. McLEAN, JR.,
Clerk of the Circuit Court of the United States for the Seventh circuit and Southern district of Ohio.

Allowed.

H. H. LEAVITT,
Judge U. S. Circuit Court, &c.

Filed March 26, 1860.

Citation.

THE UNITED STATES OF AMERICA.

Supreme Court of the United States to John Campbell, William Ellison and David T. Woodrow, greeting:

Whereas Elisha Vance obtained the allowance of our writ of error to the judges of the circuit court of the United States for the seventh circuit and southern district of Ohio, directed, to remove into the said Supreme Court, to be holden at the city of Washington, on the first Monday in the month of December next, the record of a certain plaint, process, proceedings and judgment in an action of trespass on the case, wherein you, the said John Campbell, William Ellison and David T. Woodrow, in that action lately recovered against the said Elisha Vance a judgment for costs, as by the said record in the said circuit court of the United States for said southern district of Ohio, remaining, appears, in which said record and proceedings, and also in the rendition of the judgment thereupon, manifest error hath intervened, as by the said Elisha Vance we are informed, and our said writ of error granted, issued and allowed as aforesaid, for the purpose of correcting the errors aforesaid alleged, if any there be: You are, therefore, hereby commanded and cited to be and appear before the judges of the said Supreme Court, at the city of Washington, at the next term of said court, to be holden on the first Monday in the month of December next, to have the errors aforesaid corrected, and the judgment of our said Supreme Court thereupon.

Witness the Honorable Roger B. Taney, Chief Justice of the United States of America, this twenty-sixth day of March, in the year of our Lord one thousand eight hundred and sixty, and of the independence of the United States of America the eighty-fourth.

H. H. LEAVITT,
Judge of the U. S. Circuit Court, &c.

STATE OF OHIO,
Hamilton Co., City of Cin'i, ss.

George M. Lee, being sworn, says that on the 29th day of March, 1860, he served Fayette Smith, esq., of the firm of Lincoln, Smith & Warnock, who are attorneys for Jno. Campbell, Wm. Ellison and David T. Woodrow, defendants in error, with a true copy of this notice, by delivering the same to said Smith personally.

G. M. LEE.

Sworn to and subscribed before me, March 29, A. D. 1860.

JNO. McLEAN, JR.,
Clerk U. S. C'ts., &c.

UNITED STATES OF AMERICA,
Southern District of Ohio, ss.

I, John McLean, jr., clerk of the circuit court of the United States, within and for the seventh judicial circuit and southern district of Ohio, do hereby certify that the foregoing is a true and accurate transcript of the record of proceedings in the case of Elisha Vance vs. John Campbell, William Ellison and David T. Woodrow, together with the bond and writ of error granted, as the same remains on file and of record in my office.

In testimony whereof, I have hereunto subscribed my name and affix the seal of said court, at Cincinnati, this 3d day of [L. S.] April, A. D. 1880, and the 84th year of the independence of the United States of America.

Attest: JNO. McLEAN, JR., *Clerk.*

Supreme Court U. S.—Dec. Term, A. D. 1860.

ELISHA VANCE
vs.
JOHN CAMPBELL, WM. ELLISON and
DAVID T. WOODROW.

Now comes Elisha Vance, plaintiff in error, and says that there is manifest error in the aforesaid record, in this, to wit:

1st. The circuit court below erred in excluding said plaintiff, Elisha Vance, as a witness in the cause.

2d. Said court erred in permitting the question asked said D. F. Goodhue, a witness on cross-examination, to be answered.

3d. The court erred in permitting the witness, Stephen H. Burton, to answer the question asked.

4th. The court erred in permitting the witness, William Resor, to answer the question asked.

5th. The court erred in refusing to charge the jury as plaintiff requested.

6th. The court erred in its charge as given to jury.

7th. The judgment should have been for plaintiff, instead of defendants.

Wherefore plaintiff asks that said judgment be reversed, and he be restored to all things lost thereby.

GEO. M. LEE & SAM'L S. FISHER,
Att'ys for Pl'ff in Error.

Filed 3d December, 1860.